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WONG SOON CHOON v. PP

COURT OF APPEAL, PUTRAJAYA
 MOHTARUDIN BAKI JCA
 HAMID SULTAN ABU BACKER JCA
 AHMADI ASNAWI JCA

B

[CRIMINAL APPEAL NO: C-05-222-08-2014]
 13 NOVEMBER 2015

C

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Murder – Accused convicted and sentenced to death – Witnesses’ testimony that deceased had been attacked by accused with parang – Whether accused properly identified as perpetrator of crime – Omission to state name of accused in police report – Whether fatal to prosecution’s case – Whether conviction and sentence unsafe*

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EVIDENCE: *Witness – Identification of accused person – Whether properly and positively identified – Whether safe to convict on unsatisfactory identification evidence – Best evidence rule – CCTV footage – Failure to tender – Whether accused prejudiced – Whether fatal to prosecution’s case*

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The appellant was charged for murder and causing hurt. The two key witnesses for the prosecution were occupants of a computer café (‘shop’) ie, SP7 and SP11. SP11 testified that in the incident that took place at 2am, one assailant whose face was covered with a white cloth ran into the shop and attacked the back of Lee Chin Han (‘the deceased’) with a parang. SP11 immediately ran to the rear of the shop to inform SP7. SP7 chased down the assailant whose face was covered in white cloth and pulled the white cloth covering the appellant’s face. At the same time, SP7 saw another assailant who was wearing a helmet. Based on the evidence of SP7 and SP11, the High Court Judge convicted and sentenced the appellant to death. Hence, the present appeal. The central complaint of the appellant was related to the identity of the appellant as the incident took place in the dark and the faces of the assailants were covered. In addition, the appellant contended that his name was not mentioned in the police report and that he was arrested 11 months after the incident. The issues that arose for the court’s determination were (i) whether it was safe to convict on unsatisfactory identification evidence; (ii) whether failure to produce CCTV footage reduced the value of identification; and (iii) whether there was nexus by way of DNA evidence to link the accused to the crime.

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Held (allowing appeal; acquitting and discharging appellant of both charges)

Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

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(1) SP7 and SP11 must make positive identification or be free from doubt as to the correctness of the identification for the evidence of the identity of the accused as the person who committed the crime to be sufficient.

- The trial judge should warn himself of the special need for caution before convicting the accused in reliance upon the correctness of the identification. On the facts of the case, the trial judge had failed to carry out this mandatory exercise. (para 9) A
- (2) Apart from the reference to the testimony of SP7 and SP11, the trial judge failed to address the issue of the conditions under which such identification was made. As such, the trial judge erred in accepting the evidence of SP7 and SP11 on the identification of the appellant as the basis for calling his defence. (para 9) B
- (3) Without the CCTV footage being produced, the defence was at a disadvantage or prejudiced and the truth of the prosecution's case could not be verified. Had the CCTV been produced, the trial judge would have been in a better position to verify the prosecution's version and in particular SP7 and SP11's evidence. (para 14) C
- (4) The appellant's name was not mentioned in the police report. The omission to state an important matter in the police report was fatal. More so if it was in relation to identity and the case for prosecution was not dependent on other evidence such as motive and/or DNA evidence to link the appellant to the crime. The fact that the trial judge did not probe into the issue of omission in the police report when it was material on the facts of the case had compromised the integrity of the decision-making process. (para 17) D
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- (5) The evidence of SP7 and SP11 were the only evidences to link the appellant to the crime. If the identification was unsatisfactory, other evidence may be essential to link the accused. Motive is not an essential evidence if there are direct evidence to establish the crime. However, in the absence of direct evidence or omission to produce direct evidence when it was available, evidence of motive becomes crucial in criminal jurisprudence. On the facts, the identity as well as the nexus of the appellant to the crime was challenged and placed in doubt. Therefore, the integrity of the prosecutorial process was compromised when evidence as to motive was not in place. (para 17) F
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- (6) The complaints of the appellant relating to identification, the failure of the prosecution to deal with it adequately and the failure of the trial judge to capture the evidential shortcoming in favour of the appellant compromised the integrity of the decision making process as a whole. Therefore, the conviction and sentence was unsafe. (para 18) H

Bahasa Malaysia Headnotes

Perayu telah dituduh membunuh dan menyebabkan kecederaan. Dua saksi utama pendakwaan adalah penghuni kafe komputer ('kedai') iaitu SP7 dan SP11. SP11 memberi keterangan bahawa dalam kejadian yang berlaku pada 2 pagi, seorang penyerang yang mukanya ditutup dengan kain putih berlari I

- A ke kedai tersebut dan menyerang bahagian belakang Lee Chin Han ('si mati') dengan sebilah parang. SP11 segera lari ke belakang kedai untuk memberitahu SP7. SP7 mengejar penyerang yang mukanya ditutup dengan kain putih dan menarik kain putih yang menutupi muka perayu. Pada masa yang sama, SP7 ternampak penyerang lain yang memakai helmet.
- B Berdasarkan keterangan SP7 dan SP11, Hakim Mahkamah Tinggi mensabitkan dan menjatuhkan hukuman mati terhadap perayu. Oleh itu, rayuan ini. Bantahan utama perayu adalah berkaitan dengan identiti perayu kerana kejadian tersebut berlaku dalam gelap dan muka penyerang-penyerang ditutup. Perayu juga menghujahkan bahawa namanya tidak disebut dalam laporan polis dan dia ditahan 11 bulan selepas kejadian. Isu yang berbangkit
- C untuk penentuan mahkamah adalah (i) sama ada selamat untuk mensabit berdasarkan keterangan pengecaman yang tidak memuaskan; (ii) sama ada kegagalan mengemukakan rakaman CCTV mengurangkan nilai pengenaltian; dan (iii) sama ada wujudnya *nexus* melalui keterangan DNA untuk mengaitkan tertuduh dengan jenayah.
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Diputuskan (membenarkan rayuan; melepaskan dan membebaskan perayu atas kedua-dua pertuduhan)

Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

- E (1) SP7 dan SP11 perlu membuat pengecaman positif atau bebas daripada keraguan berkaitan ketepatan pengecaman sebelum keterangan identiti tertuduh sebagai orang yang melakukan jenayah boleh dikatakan mencukupi. Hakim bicara harus mengingatkan dirinya tentang keperluan khas untuk berhati-hati sebelum mensabitkan tertuduh
- F berdasarkan ketepatan pengecaman. Mengikut fakta kes, hakim bicara gagal mengambil langkah mandatori ini.
- (2) Selain merujuk keterangan SP7 dan SP11, hakim bicara gagal menangani isu keadaan di mana pengecaman dibuat. Oleh itu, hakim bicara terkhilaf dalam menerima keterangan SP7 dan SP11 tentang pengecaman perayu sebagai asas memanggil pembelaannya.
- G (3) Tanpa rakaman CCTV, kedudukan pembelaan terjejas atau diprejudiskan dan kebenaran kes pendakwaan tidak dapat disahkan. Sekiranya CCTV dikemukakan, hakim bicara akan berada dalam kedudukan lebih baik untuk mengesahkan versi pendakwaan dan khususnya keterangan SP7 dan SP11.
- H (4) Nama perayu tidak disebut dalam laporan polis. Kegagalan menyatakan perkara penting dalam laporan polis adalah fatal. Lebih-lebih lagi jika berkaitan dengan identiti dan kes bagi pendakwaan tidak bergantung pada keterangan lain seperti motif dan/atau keterangan DNA untuk mengaitkan perayu dengan jenayah. Fakta bahawa hakim bicara tidak menyiasat isu peninggalan dalam laporan polis sedangkan ia material pada fakta kes menjejaskan integriti proses membuat keputusan.
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- (5) Keterangan SP7 dan SP11 adalah satu-satunya keterangan mengaitkan perayu dengan jenayah. Jika pengecaman tidak memuaskan, keterangan lain menjadi penting untuk mengaitkan tertuduh. Motif bukan keterangan penting jika terdapat keterangan langsung bagi membuktikan jenayah. Walau bagaimanapun, ketiadaan keterangan langsung atau peninggalan untuk mengemukakan keterangan langsung sedangkan ia boleh diperolehi, menjadikan keterangan motif penting dalam jurisprudens jenayah. Mengikut fakta, identiti serta perkaitan perayu terhadap jenayah dicabar dan diragui. Oleh itu, integriti proses pendakwaan terjejas apabila motif keterangan tidak dikemukakan. A
B
- (6) Bantahan perayu berhubung pengecaman, kegagalan pendakwaan untuk menangannya dengan baik dan kegagalan hakim bicara mengesan kekurangan keterangan yang memihak pada perayu menjejaskan integriti proses membuat keputusan pada keseluruhannya. Oleh itu, sabitan dan hukuman adalah tidak selamat. C

Case(s) referred to:

Bipin Kumar Mondal v. State of West Bengal AIR (2010) SC 3638 (refd)
Hari Nath And Anr v. State of UP AIR (1988) SC 345 (refd)
Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC (refd)
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC (refd)
Ramlal Singh And Ors v. The State AIR (1958) MP 380 (refd)
Sher Ali v. Emperor AIR (1942) Pesh 51 (refd)
Sunny Ang v. PP [1965] 1 LNS 171 FC (refd)

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Other source(s) referred to:

Janab's Key To Criminal Procedure, 3rd edn, p 66

For the appellant - Athimulan (Bob Arumugam & Ng See Teong with him); M/s Athimulan & Co

For the prosecution - Nurshafini Mustafha; DPP

[Editor's note: For the High Court judgment, please see PP lwn. Wong Soon Choon [2014] 1 LNS 1423 (overruled)]

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Reported by Sandra Gabriel

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant appeals against the conviction and sentence of death in respect of a charge for murder of Lee Chin Han (deceased) and causing hurt to Low Kam Yuet. Both the charges read as follows:

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Amended First Charge

Bahawa kamu bersama-sama seorang lagi yang masih bebas pada tarikh 04 Januari 2012, di antara jam lebih kurang 02.15 pagi hingga 2.55 pagi, bertempat di Pusat Komputer Internet Access, Lot 49, Jalan Zapin Indah,

I

A Bandar Inderapura di dalam Daerah Jerantut, di dalam Negeri Pahang Darul Makmur, dalam mencapai niat bersama telah membunuh seorang lelaki bernama Lee Chin Han, No. K/P: 860611-33-5361, dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

B Second Charge

C Bahawa kamu bersama-sama seorang lagi yang masih bebas pada tarikh 04 Januari 2012, di antara jam lebih kurang 02.15 pagi hingga 2.55 pagi, bertempat di Pusat Komputer Internet Access, Lot 49, Jalan Zapin Indah, Bandar Inderapura di dalam Daerah Jerantut, di dalam Negeri Pahang Darul Makmur, dalam mencapai niat bersama telah didapati dengan sengaja menyebabkan kecederaan terhadap seorang lelaki bernama Low Kam Yuet, No. K/P: 720821-06-5035 dengan menggunakan suatu alat, yang jika digunakan sebagai senjata untuk melakukan kesalahan yang mungkin menyebabkan kematian iaitu sebilah parang dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 324 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

E [2] The facts of the case is quite straightforward and the learned trial judge has documented it in detail. It will serve no useful purpose to repeat them save to say this judgment must be read with the judgment of the trial court for purpose of comprehensiveness.

F [3] The central complaint of the appellant before us is related to the identity of the accused. Learned counsel says the incident was in the dark and the said assailants were the one who covered his face in white cloth and the other was wearing a helmet. The assailants' names were not mentioned to the police though the witnesses claimed that they knew the assailant whose face was covered with white cloth and no name of the assailants were mentioned in the police report. In consequence, appellant argues that the conviction is not safe in reliance of the Federal Court case of *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1; [2007] 4 AMR 709. In addition, the appellant complains that the identification parade was bad in law.

G [4] The petition of appeal reads as follows:

- H
1. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila memutuskan pihak pendakwa telah membuktikan satu kes *prima facie* sedangkan tidak ada keterangan;
 2. Yang Arif Hakim terkhilaf apabila memutuskan pendakwa membuktikan kes *prima facie* bagi kes pertuduhan di bawah Sek 324 KK sedangkan keterangan mangsa [SP7] sendiri menimbulkan keraguan serius perayu yang mendatangkan cedera/menyerangnya;
 - I 3. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila gagal memutuskan secara maksima bahawa keterangan SP7 dan SP11 tidak boleh dipercayai;

4. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila mempertimbangkan kes pembelaan; A
5. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila tidak ambil kira keterangan-keterangan yang menyebelahi pembelaan;
6. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila ambil kira keterangan yang tidak relevan; tidak boleh diterima masuk sebagai keterangan dan juga tersalah ambil kira keterangan 'prejudicial'; B
7. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila salah arah undang-undang secara tidak melakukan arahan dalam beberapa isu undang-undang pada tahap pendakwaan dan tahap pembelaan; C
8. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila tidak ambil kira apabila terdapat percanggahan ketara jawapan yang diberikan oleh SP7 dan SP11 semasa pemeriksaan utama dan pemeriksaan balasnya; D
9. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila gagal ambil kira terdapat percanggahan antara keterangan SP7 dan SP11 bandingkan keterangan saksi pendakwaan lain dan keterangan dokumentari; E
10. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila gagal buat dapatan fakta mengenai kewujudan keraguan munasabah yang memihak Perayu di mana saksi-saksi pendakwaan telah memberikan dua set keterangan yang bercanggah terhadap perkara yang penting; E
11. Yang Arif Hakim bijaksana terkhilaf dari sesi undang-undang dan fakta apabila salah arah diri apabila menerima pengecaman yang dibuat semasa perbarisan itu boleh dipercayai di bawah ujian *Turnbull*; F
12. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila menerima keterangan pengecaman yang dibuat SP7 dan SP11 sedangkan keterangan kedua-dua saksi menimbulkan keraguan; G
13. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila gagal menilai maksima keterangan SP7 dan SP11;
14. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila gagal ambil kira keterangan DNA yang menyebelahi Perayu; H
15. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila tidak memberi keseriusan terhadap isu, iaitu SP11 yang buat repot tidak langsung menyebut nama "Fei Chong" dan tidak ada deskripsi suspek; I

- A 16. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila tidak ambil kira mengenai pengendalian kawat cam tidak mengikut peraturan dan undang-undang;
17. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila gagal ambil kira keterangan Pegawai Siasat SP14 yang
- B menyebelahi pembelaan;
18. Yang Arif Hakim bijaksana terkhilaf dari segi undang-undang dan fakta apabila gagal menimbulkan adverse inference dibawah Sek. 114(g) Akta Keterangan apabila CCTV tidak dikemukakan sebagai barang bukti.

C [5] The police report lodged by Ng Sok Fui reads as follows:

- Pada 4/1/2012 jam 1/kurang 2.15 pagi semasa saya bekerja sebagai penjaga di Pusat Access Network No. 49, Tkt Atas, Jalan Zapin Indah 2, Jerantut, Pahang, nampak seorang lelaki Cina dengan menutup sebahagian muka menggunakan kain putih dan bawa sebilah parang ditangan sebelah kanan.
- D Lelaki Cina itu terus menyerang seorang lelaki cina yang sedang asyik melayarkan internet. Saya nampak lebih kurang 2 ke 3 kali lelaki cina itu menyerang dengan parang. Saya terus lari kebahagian belakang dan mengejut suami saya sedang tidur. Suami saya terus ambil sebatang kayu dan keluar mengejar lelaki Cina berkenaan hingga ke tingkat bawah. Lebih kurang 2 minit kemudian saya terus turun ke bawah dan dapati suami
- E saya telah diserang oleh dua lelaki Cina dengan parang. Saya jerit jangan potong dan suruh suami saya lari dari situ dan suami saya terus lari ikut lorong belakang bangunan Jerantut Cushion. Manakala saya lari keatas dan nampak seorang lelaki Cina dalam keadaan luka parah dengan pergelangan tangan kanan putus. Saya turun semula ke bawah dan dapati suami saya dalam keadaan cedera parah bahagian belakang leher,
- F bahagian belakang badan, perut dan bahagian paha. Saya terus bawa suami saya di Hospital Jerantut manakala seorang lagi mangsa saya dapat tahu dibawa oleh ambulan ke Hospital Jerantut. Sekian laporan saya.

Brief Facts

- G [6] The two key witnesses for the prosecution are husband (SP7 - Low Kam Yuet) and wife (SP11 - Ng Sok Fui), the occupants of the computer cafe. The incident took place at about 2am in the morning. While SP11 was at the counter of the shop, one assailant whose face was covered with the white cloth ran into the shop and attacked the back of the deceased with a 'parang'. SP11 immediately ran to the rear of the computer cafe to inform SP7. SP7
- H chased down the assailant whose face was covered in white cloth and also saw the deceased. SP7 then pull the white cloth covering the accused face and at the same time saw the other assailant who was wearing a helmet (the deceased's hand has been chopped off at that time). SP7 also heard the man wearing the helmet had said to the accused 'Fel Choong tetak dia'.
- I [7] Both the witnesses attribute the name of 'Fel Choong' to the accused and had given evidence to say they knew him previously.

[8] There was no credible evidence adduced at the trial to say that both the witnesses have given the names of the assailants to the police or had given a proper description of the assailants to the police. In addition, there was also a CCTV camera at the shop and there was no evidence produced by the police by way of photos to establish the identity of the appellant. The appellant was arrested only after 11 months of the incident and no probative evidence was given to show the basis of the arrest and nexus relating to the information of SP7 and SP11.

A

B

Unsatisfactory Identification Evidence

[9] On the issue of unsatisfactory identification evidence, learned counsel for the appellant says:

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- 1.1. We respectfully submit that in this case, the criminal act is not contested and the identity of the accused as the perpetrator, is the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at the trial. If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavourable or supporting evidence is lacking or weak, honesty of the witnesses will not suffice to raise the case to the requisite standard of proof and a conviction so founded is unsatisfactory and unsafe. (See *Jaafar bin Ali v. PP* [1998] 4 MLJ 405; *R v. Turnbull and Others* [1976] 3 All ER 549).

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- 1.2 It is essential that identifying witness (SP7 and SP11) must make positive identification or be free from doubt as to the correctness of the identification for the evidence of the identity of the accused as the person who committed the crime to be sufficient. We humbly submit, the evidence are uncertainty and uninspiring in confidence.

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- 1.3 We humbly submit that the following flaws will show the conviction is unsafe:-

(i) Failure to warn himself about the damages of identification evidence.

- 1.4 The learned trial judge should warn himself of the special need for caution before convicting the accused in reliance upon the correctness of the identification. In this case, the learned trial judge had failed to carry out this mandatory exercise. The learned trial judge also failed to direct himself as to the reason for the need of such warning and failed to make some reference to the possibility that a mistaken witness can be convincing one and that a number of such witness can all be mistaken. (See the case of *Turnbull*).

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- 1.5 Even in the case of recognition, the learned trial judge should be reminded that mistakes in recognition of relatives and friends are sometimes made. We humbly submit that the learned trial judge had failed to apply this.

I

(ii) Failed to examine closely the circumstances.

- A** 1.6. We respectfully submit that learned trial judge has failed to examine close the circumstances such as:
- How long did the SP7 and SP11 had the accused under observation?
- B** Was the observation impeded in any way?
- How often the witness has seen the accused?
- Any special reason for remembering?
- How long elapsed between the original observation and the subsequent observation to the police?
- C** Was there discrepancy?
- Was it made in darkness?
- Was it made in fleeting glance?
- D** 1.7. We humbly submit that the learned trial judge erred himself in accepting the evidence of SP7 and SP11 on the identification of the appellant as the basis for calling for his defence. The learned trial judge failed to indicate that apart from the reference to the testimony of SP7 and SP11, he failed to address the issue of the conditions under which such identification was made. It is incumbent upon the trial judge evaluate the quality of evidence given in the circumstances in which they were made.
- E** 1.8 With regard to the lighting positing SP7 testified that it was dark and the place was 'kelam kabut' and there were many people and there was a fighting.
- F** SP7's evidence
- i. Saya tak ambil perhatian dalam kedai. Saya tergesa-gesa turun.
- ii. Q: Masa turun ada ramai orang di bawah?
- A: Ramai melarikan diri.
- G** iii. Waktu kejadian pagi dan kawasan kejadian gelap?
- A: Ya.
- iv. Q: Masa awak lari lepas kena ketak, keadaan masih kelam kabut?
- A: Ya.
- H** v. Q. Pada masa itu kamu tumpu perhatian kepada orang yang pegang parang yang pakai helmet itu?
- A: Ya.
- I**

- 1.9. We humbly submit the evidence of SP7 and SP11 very weak and shows doubtful evidence: A
- SP7
- A: Saya nampak itu orang bertutup dengan kain putih, muka tutup dengan kain putih. B
- Q: Dia tak bawa apa-apa kah?
- A: Saya tak nampak.
- J: Saya ada tengok dia tetapi, saya tidak perasan sama ada dia bawa apa-apa atau tidak. C
- SP11's evidence
- Q: Masa dia menetak kamu hanya nampak muka mangsa tapi tak nampak muka orang itu?
- A: Ya, saya tak nampak muka orang itu.
- 1.10. SP7 further testified that: D
- Q: Siapa yang potong awak?
- A: Saya tidak tahu siapa potong saya.
- 1.11. Omission to mention in the FIR involvement of the appellant E
- We humbly submit that SP7's and SP11's veracity is brought into question by reason of discrepancies between police report (FIR) and his/her evidence. The most prominent and significant was the omission to mention in FIR the involvement of the appellant.
- We rely on the Federal Court case of *Lee Ah Seng & Anor v. PP* [2007] 4 AMR 709 at page 726 para 23, it was held: F
- It is unnatural for a person who claims to have seen another commit a crime to report the crime and yet withhold the identity of the perpetrator, because the purpose of reporting a crime is to bring the wrongdoer to justice.
- 1.12. We also submit that no reasons were given as to why SP11 not mentioning the appellant's name and his involvement in her police report. The truth of SP11 and SP7 becomes open to at least a reasonable doubt. We rely on the Federal Court case of *Lee Ah Seng* at page 727: G
- The logic is simple, If it was true that Hassan Lee, as he said in evidence, saw the appellant's chase, by the natural course of human conduct, he would have mentioned the fact in the FIR. Since he did not, and he failed to give a reasonable explanation for the omission, the truth of his evidence becomes open to at least a reasonable doubt. H
- I

- A 1.13 Therefore, in view of SP1's omission to identify the accused and his involvement as the assailant; it raises reasonable doubt as to the identity of the perpetrator. In such circumstances, evidence of SP11 and SP7 did not amount to a credible and safe identification to be relied upon in convicting the appellant. The conviction is unsafe.

B *Failure To Give Description Of The Accused To The Police*

[10] On the issue of failure to give description of the accused to the police learned counsel for the appellant says:

- C 1.14. The quality of the identification of SP11 and SP7 is of poor quality because of the law requires. In this, SP11 and SP7 never gave any description of the accused to IO or any other people. [See the judgment of *Jaafar Ali v. PP* [1999] 4 MLJ 406 at page 417 at para H:

- D The quality of identification that is required includes description of the accused that the identifying witness must have given to the police. The need for such description is implicit in *Turnbull* itself.

And at page 420 line F:

The absence of pre-trial description of the accused will reduce the value of identification.

E *CCTV Not Tendered*

[11] On the issue of failure to tender the CCTV footage, learned counsel for the appellant says:

- F The failure to produce CCTV footage, further reduce the value of identification. The evidence of SP7 and SP11 is put into serious doubts. We humbly refer further submission as in 2nd issue.

Weight Of SP7 And SP11 And Fleeting Glance

- G [12] On the issue of weight of the evidence of SP7 and SP11, learned counsel for the appellant says:

- 1.16. We respectfully submit that the quality of the evidence of SP7 and SP11 was not assessed properly. The learned trial judge had failed to consider the following factors:

- H (i) visibility;
(ii) proximity;
(iii) has opportunity for observation; and
(iv) corroboration.

- I 1.17. The quality of the evidence of SP11 and SP7 is also poor as it depends solely on 'fleeting glance' and since there is no other supporting evidence to support the correctness of the identification. (See *Jaafar Ali's* case).

Defect In Identification Parade

A

[13] On the issue of identification parade, learned counsel for the appellant says:

ID Parade Irregular

- 1.18. It is humbly submitted, when the identification parade was conducted, the appellant was not masked. The conditions were therefore less than ideal and not reflective of the actual circumstances under which SP7 and SP11 alleged to have seen the assailant in question.

B

2nd Flaw

- 1.19. The difference age group participant attended the ID parade. SP11 testified that the ID Parade was conducted by a Malay Officer. SP11 lied on this.

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3rd Flaw

- 1.20. SP11 testifies on oath that the identified participant No. 1 in the ID Parade. There is serious material conflict in that the Indian Officer who conducted ID parade testified that SP11 identified participant No. 10. This is an acute conflict of evidence. Serious discrepancy. The SP7 on the contrary identified the participant No. 2.

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- 1.21. We humbly submit, that we are also relying on the judgement of the Federal Court in *Mahinder Singh v. PP* [1967] 1 MLJ 126 where Ong Hock Chye, FJC at page 127 para A held:

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... it was not sufficient merely that the complainant appeared quite certain in his own mind that the accused was his assailant. It was clearly necessary for the court to examine also the grounds of his belief before regarding the question as closed.

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Best Evidence Rule Breached

[14] On the issue of failure to tender the best evidence, learned counsel for the appellant says:

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- 2.1. We respectfully submit that the learned trial judge failed to realise without CCTV footage of the crime scene being produced, the defence was disadvantaged or prejudiced and the truth of the prosecution's case could not be verified. The importance of the CCTV footage cannot be doubted in this case because the whole case turns on the identification of the accused and as to whether such identification by the SP7 and SP11 can be relied upon.

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- 2.2 Had this CCTV been produced, the learned trial judge would have been in a better position to verify the prosecution's version and in particular SP7 and SP11's evidence. Therefore, we humbly submit that non-production of the CCTV footage and forensic report of the CCTV amounts to a withholding or suppression of evidence and if it was produced, it would be unfavourable to the prosecution and consequently an adverse presumption under s. 114(g) of Evidence Act must be invoked.

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- A 2.3. The reasons why the CCTV footage becomes important are as follows:
- (i) The SP14 who is the IO of the case, during the re-examination-in-chief, said:
- B Tapi pada masa itu CCTV berfungsi”.
- (ii) At page 155 of the Appeal Record, SP14 said:
- Q: Dalam kedai tempat kejadian ada CCTV?
- A: Ya, ada.
- C (iii) At page 155 of the Appeal Record, SP14 said:
- Q: Ada ambil gambar CCTV?
- A: Tidak.
- (iv) At page 155 of the Appeal Record, SP14 said.
- D Q: Ada rampas CCTV?
- A: Tidak.
- (v) At page 155 of the Appeal Record, SP14 said:
- Q: Alat CCTV penting untuk dapat rakaman siapa yang masuk Cyber Cafe?
- E A: Ya, setuju ia penting dan membantu siasatan.
- (vi) At page 120 of the Appeal Record, SP11 said:
- Q: Awak tak perasan kerana kamu sedang melihat pemain-pemain dan juga tengok CCTV yang ada dalam kedai, betul?
- F A: Saya ada tengok dia tetapi saya tidak perasan sama ada dia bawa apa-apa atau tidak.
- G 2.4. We respectfully submit the importance of the CCTV footage cannot be doubted. The only way to verify the SP7's and SP11's evidence would be to see the CCTV footage, but it was not tendered. The investigating officer's evidence (SP14) showed the importance of the footage evidence being highlighted in the prosecution's case. We respectfully rely on the judgment of this honourable court in the case of *See Kek Chuan v. PP* [2013] 6 MLJ 885, where His Lordship Abdul Malik Ishak JCA at page 899 in allowing the appeal only on this ground said:
- H
- I It goes without saying that the non-production of the CCTV footage had disadvantaged or prejudiced the defence and the truth of the prosecution's case could not be verified. Indeed in a criminal trial, fairness must be displayed by the prosecution. And the concepts of a fair trial and fairness have been recognised by our Malaysia Courts in *Cheak Yoke Thong v. PP* [1984] 2 MLJ 119 (FC).

At para 36:

Now, s. 114(g) of the Evidence Act 1950 applies to both civil and criminal cases. It operates when a witness is not called or in a situation, like the present case, where the CCTV footage which is a piece of material evidence has not been produced.

Failure To Give Appropriate Consideration To The Defence Case

[15] Learned counsel for the appellant says there was a failure by the learned trial judge to give appropriate consideration of the defence case and says:

3.1. Humbly submit that the trial judge's failure to give adequate and dispassionate consideration to the appellant's defence evidence including the prosecution's evidence which are favourable to the defence amounts to serious misdirection by way of non-direction which caused substantial miscarriage of justice.

3.2 The learned trial judge misdirected himself in law when he commented and made adverse inference when the defence failed to call supporting evidence where the learned trial judge went against the principle laid down by *Goh Ah Yew v. PP* [1949] MLJ 150, where it was held that:

No such inference, however, can be drawn against an accused in a criminal trial. There is no duty upon an accused to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn because he adopts one course rather than the other.

3.3. The learned trial judge had failed to apply the test laid down in *Mat v. PP* [1963] MLJ 263, whereby he failed to go one step further to give sufficient reasons that even though he does not accept or believe the appellant's explanation why it does not cast a reasonable doubt in the prosecution's case. Humbly submit that the trial judge failed to offer any reason why the defence had failed to cast reasonable doubt. It was wrong for the trial judge to conclude that the defence failed to raise reasonable doubt simply on the ground by comparing the evidence of the prosecution and the defence; the evidence of defence was an afterthought and fabrication.

3.4 The defence is not a mere denial. He gave full explanation reasonably dislodging the mistaken identity of the prosecution's case. It is also the trial judge's duty to consider the prosecution evidence and re-evaluation the maximum - like taking together with defence evidence. The learned trial judge had failed to evaluate the whole of the evidence objectively and from all angles to decide whether there will be a safe conviction without miscarriage of justice. There were serious doubts as to the evidence of the identity of the perpetrator of the crime.

- A 3.5. It is respectfully submitted that the appellant gave sworn testimony and his evidence was not impeached and most of the material evidence not challenged at all. He explained why he was at the crime scene and gave factual explanation as to the time, where, why there and what did he see and what did he do. He was neither wearing helmet nor facial mask. He never knew the deceased and never assaulted anyone. His blood was taken for DNA test to link him with this case, but the DNA test gave negative result.
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[16] Learned Deputy Public Prosecutor has filed a lengthy submission to support the grounds of the judgment. We do not wish to repeat as the facts and law relating to the issues as it is not one of dispute and as the appellate court, we need only consider whether it is safe to convict on unsatisfactory identification evidence and when there is also no nexus by way of DNA to link the accused by taking into consideration the best evidence by way of CCTV footage to assist in the identification has not been produced.

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- D [17] We have read the appeal record, petition of appeal and the able submissions of learned counsel for the appellant and learned Deputy Public Prosecutor. After giving much consideration to the submission, we take the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

- (a) in the instant case, it is not in dispute that the name of the appellant was not mentioned in the police report. It is now well established the omission to state an important matter in the police report may be fatal, more so if it relates to identity and the case for prosecution is not dependent on other evidence such as motive and/or DNA evidence to link the accused. Support for the proposition is well founded in the Federal Court case of *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1; [2007] 4 AMR 709. (See *Herchun Singh & Ors v. PP* [1969] 1 LNS 52; [1969] 2 MLJ 209; *Sher Ali v. Emperor* AIR (1942) Pesh 51; *Ramlal Singh And Ors v. The State* AIR (1958) MP 380; *Hari Nath And Anr v. State of UP* AIR (1988) SC 345);
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- G (b) learned authors of *Janab's Key To Criminal Procedure*, 3rd edn at p. 66 have this to say:

Failure to state material particulars in the first information report may be fatal, unless there were good reasons for the omission or contradictions.

- H in the instant case, the learned trial judge did not probe into the issue of omission in the police report when it was material on the facts of the case. This, in our view, has compromised the integrity of the decision making process; and

- I (c) it is not in dispute that SP7 and SP11 evidence the only evidence to link the appellant to the crime. If the identification is unsatisfactory, other evidence may be essential to link the accused. Motive is not an essential evidence if there are direct evidence to establish the crime. In the

absence of direct evidence or omission to produce direct evidence when it is available, evidence of motive becomes crucial in criminal jurisprudence. (See *Sunny Ang v. PP* [1965] 1 LNS 171; [1966] 2 MLJ 195). When identity as well as nexus of the appellant to the crime is challenged and/or placed in doubt as in this case, in our view the integrity of the prosecutorial process is compromised when evidence as to motive is not in place. In *Bipin Kumar Mondal v. State of West Bengal* AIR (2010) SC 3638, the Indian Supreme Court had this to say:

the proof of motive is not essential when direct evidence establishes crime. However, in cases based on circumstantial evidence, motive does assume great importance.

[18] All the above complaints by the appellant relating to identification and the failure of the prosecution to deal with it adequately and the failure of the learned trial judge to capture the evidential shortcoming in favour of the appellant compromises the integrity of the decision making process as a whole, warranting this court to rule the conviction and sentence as unsafe.

[19] For reasons stated above, we take the view it is fit and proper case to allow the appeal and set aside both the conviction and sentence of the High Court and rule that the appellant is acquitted and discharged of both the charges.

[20] We hereby ordered so.

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